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No. 99-1815

IN THE
Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

KENTUCKY RIVER COMMUNITY CARE, INC. *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE KENTUCKY STATE DISTRICT COUNCIL OF CARPENTERS

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REPLY BRIEF FOR THE KENTUCKY STATE DISTRICT COUNCIL OF CARPENTERS

I. The Board Correctly Applied Its Reasonable Construction of the Ambiguous Term "Independent Judgment" To the Facts of this Case

A. Neither the Employer Nor the Amicus Dispute the Actual Holding in this Case

In our opening Brief 4-6, 43-46, we demonstrated that the only authority actually possessed by the RN Building Supervisors is to insure that the minimum staff-to-resident ratio is maintained and to seek volunteers to work an extra shift if "the head count" reveals that additional staff is needed. JA 27. *See* PA 51a. The Employer asserts that as Building Supervisors "the RNs are in charge of the entire facility," KRCC Br. 2, and then cites three parts of the record that do not support the assertion: JA 17 on which the Administrator makes clear that the designation "means that they are responsible for kind of overviewing the coverage;" JA 29 on which he explains that they "make sure the head count is there;" and JA 36 which also indicates only that Building Supervisors handle "coverage issues."[1]

In our opening Brief 1-4, we demonstrated that the primary duty of the RNs is to personally provide medical care to the residents of the facility. Only as an incidental part of their

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[1] One further example reflects the extent of the Employer's dishonest treatment of the record. The Employer concludes its statement of the facts, "'[W]hatever's necessary can be carried out" by the Building Supervisor. J.A. 28." KRCC Br. 5. But these words are taken from the testimony of the Administrator and refer to the Building Supervisor calling off-duty employees from a list to insure the minimum ratio: "sometimes maybe they only have to have them come in early a few hours, just to overlap so that, you know, whatever's necessary can be carried out."

own direct patient care do the RNs direct less skilled employees to perform specific tasks. The RNs have no authority to discipline an employee who refuses to provide such assistance. Indeed, the only specific example of such limited direction found in the record is RNs requesting that an LPN give a particular medication to a resident. PA51a.

The Employer, again incorrectly, asserts that the "LPNs are supervised by and must comply with the directions of the RNs," KRCC Br. 2, and cites three parts of the record: JA 17-18 which states only that RNs ask LPNs to pass medications; JA 29 which is irrelevant; and JA 54 which states that an RN was told that "RN's and LPN's are the same at Caney Creek;" that an LPN should do what an RN directs "in some cases" but that an RN would yield to a more expert LPN; and that a disagreement between an RN and an LPN would be resolved by their supervisor, the Clinical Coordinator. Similarly, the Employer asserts that "[t]he RNs also direct the 40 rehabilitation assistants on how to deal with unusual situations that arise whenever a rehabilitation counselor is not present," KRCC Br. 2, but cites for support one page of the record, JA 16, that is irrelevant. The Employer continues by asserting that the Rehabilitation Assistants must report resident medical problems to the RNs and "follow the RN's instruction," KRCC Br. 2, but there is nothing in the cited record reference, JA 57, 58, that suggests the latter requirement.

In sum, the Employers literally says nothing that undermines the Board's finding, guided by the principles set forth in *Providence Hospital*, 320 NLRB 717, 727 (1996), *enf'd*, 121 F.3d 548 (9th Cir. 1997), that: i) the RN Building Supervisors' limited and tightly regulated assignment of other employees did not "require[] the use of independent judgment" ; and ii) that, while the RNs might exercise independent judgment in carrying out their own professional duties, their delegation of discrete tasks to others does not

"require[] the use of independent judgment." 29 U.S.C. §152(11).

B. The Board's Distinction Between "Supervisory 'Independent Judgment'" and Professional, Technical and Other Forms of Independent Judgment is Reasonable and Based on the Act

The Board's conclusion in this case flows from the construction of the Act articulated in *Providence* and *Ten Broeck Commons*, 320 NLRB 806 (1996), which was drawn from long-standing decisions concerning other occupations and which has since been elaborated in relation to other categories of employees:

> [W]hen a professional gives directions to other employees, those directions do not make the professional a supervisor merely because the professional used judgment in deciding what instructions to give. . . . Independent judgment must be exercised in connection with the §2(11) function if the actor is to be deemed a statutory supervisor. [*Providence*, 320 NLRB at 728.]

The Employer argues that the Board has created a "false dichotomy between professional judgment and independent judgment." KRCC Br. 9. To the contrary, what the Board has done is to recognize a distinction between *professional* independent judgment and *supervisory* independent judgment that is required by the statutory definitions

By distinguishing "discretion or judgment . . . [that] relates to [employees' performance of] their own responsibilities and is based on their experience and expertise" from "the exercise of supervisory independent judgment," *KGW-TV*, 329 NLRB No. 39 at 5-6 (1999), the Board faithfully adheres to the distinction drawn by the Act between "employees"—including "professional employees," who, by definition, "exercise . . . discretion and judgment," 29 U.S.C. §152(12)(a)(ii)—and "supervisors." The Act provides that a

person is "employed as a supervisor" *only* if that "individual ha[s] authority" to act as a supervisor in one of the respects identified in § 2(11) *and* "the *exercise of such authority* . . . requires independent judgment." 29 U.S.C. § 152(11) (emphasis added). In this way, the statutory definitions draw "a distinction between authority arising from professional knowledge and authority encompassing front-line management prerogatives." *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 583 (1994) (*HCR*).

In nurse and non-nurse cases, then, the Board has properly used the term "supervisory 'independent judgment'" to identify the nature of the independent judgment that must be exercised by a statutory supervisor. *See Providence*, 320 NLRB at 730; *Mississippi Power & Light Co.*, 328 NLRB No. 146 at 7 (1999). The evidence must "show that the [employees'] assignment and direction require the use of supervisory 'independent judgment.'" *Id.*

The Board's approach in this regard is spelled out in great detail in *Mississippi Power*—a recent, comprehensive decision which applies the principles articulated in *Providence* and *Ten Broeck* in a case involving neither professional employees nor the health care industry. The analysis in *Mississippi Power* provides a fully reasoned answer to the Employer's "false dichotomy" charge. As *Mississippi Power* demonstrates, the Board's application of the statutory definition of "supervisor" turns on a "distinction between judgment necessarily used by employees in performing their own jobs and judgment involved in supervising employees." 328 NLRB No. 146 at 10. In this regard, the Board distinguishes between "the exercise of judgment pursuant to an employee's professional, technical, or experienced special knowledge or expertise" in carrying out the employee's "own responsibilities" and "the exercise

of Section 2(11) supervisory independent judgment." *Id.* at 9-10.

Mississippi Power applies the same distinction that is the basis for the Board's decision here, but it does so in analyzing whether certain dispatchers employed by an electrical power company—rather than nurses employed in a residential care facility—are supervisors. The Board begins by emphasizing that the dispatchers in question had "responsibilities [that] are two-fold, i.e., their selection or design of switching orders, and their communication with field employees" regarding these orders. 328 NLRB No. 146 at 9. With regard to their first set of responsibilities, the Board found that the "dispatchers exercise substantial and significant independent judgment in applying their own technical training, experience, and expertise to the portion of their jobs which involves the selection or design of the proper switching sequences for planned or emergency [power] outages." *Id.* at 9. But the Board concluded that "the exercise of special knowledge or expertise" by the dispatchers in the "performance of their own job" did "not constitute the exercise of Section 2(11) supervisory independent judgment," because it was "quite different from the exercise of independent judgment in overseeing the work of others." *Id.* at 9-10.

Turning to "[t]he second part of the . . . dispatchers' responsibilities," the Board found that "their interaction with field employees . . . is limited to communicating or relaying the switching orders or sequences, making certain that the actual switching has been done, and ascertaining from the field employees where and what the trouble is during power outages." *Id.* at 10. Noting that "the communication of . . . switching orders simply involves relaying the switching sequence, step-by-step, to field employees," the Board concluded that "this relay of information . . . does not entail the exercise of supervisory independent judgment." *Id.* In

sum, having found that "[w]hat judgment is necessary to the dispatchers' jobs already has been undertaken by . . . the dispatchers . . . in designing the proper switching sequences," the Board concluded that "[t]he mere communication of these technical decisions does not constitute statutory supervision." *Id.* The Board recognized that the "'back-and-forth' communication" between the dispatchers and the field employees did "[i]n a sense, . . . involve[] 'directing' the field employees in the performance of their work" and, taking that into account, the Board concluded that, because "this relay of information . . . does not entail the exercise of supervisory independent judgment." *Id.*

The RNs, in this case, like the dispatchers in *Mississippi Power*, "exercise substantial and significant independent judgment in applying their own . . . experience, and expertise . . . [in] [t]he performance of their own job[,]" but not in the communication of their decisions to others in the form of directions. 328 NLRB No. 146 at 9-10. It may be true that "rarely anything . . . is routine" at residential care facilities like Caney Creek, because "unexpected situations involving residents do occur." KRCC Br. 12. However, "the judgment exercised by the [RNs] in [responding to the residents' varying medical needs] is a function of the [nurses'] own work, based on their training, knowledge, and experience and does not constitute the exercise of independent supervisory judgment." *Mississippi Power*, 328 NLRB No. 146 at 10.

To be sure, executing such treatment decisions will often require "'back-and-forth' communication," between the RNs and the other staff. *Id.* But the RNs' exercise of independent judgment in the "performance of their own job . . . is quite different from the exercise of independent judgment in overseeing the work of others." *Id.* Put simply, it may not be "routine" for a facility resident to exhibit certain symptoms and thus it may require independent professional judgment for a RN to decide what form of medication should be given

to the resident. But it does not follow that asking the only LPN on duty to give the medication to the resident "requires the exercise of independent judgment" as required by §2(11). By conflating professional independent judgment and supervisory independent judgment, the Employer "fails to appreciate the distinction between judgment necessarily used by employees in performing their own jobs and judgment involved in supervising employees." *Mississippi Power*, 328 NLRB No. 146 at 10.

Finally, the Employer's emphasis on the importance of the decisions made by the RNs has no statutory foundation. In *Mississippi Power*, the Board, faced with a situation involving skilled employees with comparably sensitive responsibilities, correctly warned against being "swayed by the complexity of the [employees'] responsibilities and the adverse consequences to the well-being, safety, and lives of the public and employees that might result from [employees'] faulty decisions. . . . That severe consequences might flow from the [employees'] misjudgments in their own work . . . does not necessarily make their judgments supervisory." 328 NLRB No. 146 at 5-6. Grave consequences may flow from nurses' choice to use the wrong medication, but that does not make nurses supervisors merely because they invoke the assistance of employees assigned to help them execute their professional decisions when "the exercise of such authority" does not "require[] the use of independent judgment." 29 U.S.C. §152(11).

C. The Distinction Does Not Prevent Nurses and Other Professionals From Being Classified as Supervisors

The Employers' key assertion—that, extended to its logical conclusion, the Board's construction of the Act would prevent any nurse, indeed, any professional from being classified as a supervisor—is belied by the Board's jurisprudence. The Board has, in fact, classified both nurses

and other professionals as supervisors, *see* Union's opening Brief at 36 n. 16, and done so on the proper statutory grounds that, unlike the RNs at issue in this case, those individuals did exercise independent judgment in the direction and assignment of employees. Thus, it is clear that the Board been sensitive to this Court's instruction in *HCR* not to "read[] the responsible direction portion of § 2(11) out of the statute in nurse cases." 511 U.S. at 579.

Contrary to the Employer's assertion, the distinction between "discretion or judgment . . . [that] relates to [employees' performance of] their own responsibilities" and "the exercise of supervisory independent judgment," *KGW*, 329 NLRB No. 39 at 5-6, does *not* "eliminate professionals as supervisors." KRCC Br. 17. In the first place, the Board has not confined this analytical distinction to cases involving "professionals," but has "applied this general principle to various relationships, including those involving charge nurses, journeymen construction workers, engineers, and tugboat docking pilots." *Mississippi Power*, 328 NLRB No. 146 at 10 (citations omitted). More basically, under the Board's approach a professional employee will be deemed a supervisor so long as he or she "exercise[s] . . . independent judgment in overseeing the work of others." *Id.* at 10.

The Board's approach is nuanced as it must be to address the "infinite and subtle" "gradations of authority" that exist in the workplace. *Marine Engineers Beneficial Ass'n v. Interlake S.S. Co.*, 370 U.S. 173, 179 n. 6 (1962). Indeed, in every health care case that has come before it, the Board has drawn a line between those nurses who exercise independent judgment in supervising other employees and those who exercise independent judgment in the performance of their own work but not in the incidental assignment and direction of others—in some cases by accepting the parties' stipulation and in others through adversarial litigation. *See, e.g., Newton-Wellesley Hospital*, 219 NLRB 699, 700-02 (1975)

(holding nurse supervisors and others to be supervisors, but not head nurses); *Wing Memorial Hospital Ass'n*, 217 NLRB 1015, 1015-16 (1975) (holding nurse shift supervisors to be supervisors, but not head nurses).

The Board, moreover, has excluded some nurses as supervisors on the grounds that they exercise independent judgment in the direction and assignment of subordinates while, in the same case, including other nurses who, in the course of their own work as professionals incidentally direct or assign others, but who do not exercise independent judgment in the acts of supervision. *See, e.g., Newton*, 219 NLRB at 700-02; *Wing*, 217 NLRB at 1015-16 (nurse shift supervisors "in charge of nursing and other personnel on their shift [and] responsibly direct them" and "select[] the personnel for each section" while head nurses assign personnel to patients in section and "give[] direction to other employees which is incidental to the professional's treatment of patients"). In this case itself, the parties stipulated and the Board found that one of the seven nurses, the Clinical Coordinator, was a supervisor, in part because she assigned nursing personnel to shifts which the Board explained in *Providence* is "the type of assignment most closely identified with essential managerial functions requiring the use of independent judgment." 320 NLRB at 731; JA 29, 34; PA 54a.

It is thus clear that the Board has *not* suggested, as the Employer asserts, that the exercise of professional judgment can never overlap with the exercise of supervisory independent judgment. A professional in the position of a supervisor, such as a Director of Nursing, surely relies on professional judgment in performing a range of §2(11) functions that themselves require the use of independent judgment. The infusion of professional judgment into the independent supervisory judgment unquestionably exercised by such an official does not remove him or her from the

category of supervisor, and the Board has never so held. Rather, the Board's analysis is implicated only in cases like this one where the professionals are both working at their trade and, incidental to their own work, assigning and directing others. It is only in this type of case that the Board is required by the text of the Act to sort out professional judgment from "supervisory 'independent judgment.'" And it is only in this type of case that the Board's conclusion in *Providence*—that "Section 2(11) supervisory authority does not include . . . the direction which is given by an employee with specialized skills and training which is incidental to the directing employee's ability to carry out that skill and training"–comes into play. 320 NLRB at 729. The Board's position that the exercise of professional judgment in cases like this is not necessarily the exercise of "supervisory 'independent judgment'" is a far cry from a holding that no nurse and no professional can be a supervisor. That is why the Board has held, contrary to the Employers' assertions, that nurses and other professionals are supervisors when their assignment and direction of other employees is not incidental to the performance of their own professional duties or, in other words, when they are "truly supervisory" as intended by Congress. *Legislative History of the Labor Management Act, 1947* 425(hereinafter *Leg. Hist.*).

The sum of the matter is that the Board has neither classified all nurses as employees nor as supervisors. Rather, the Board has drawn a line between classes of nurses based on the nature of the authority they exercise over other employees at particular workplaces. The Board's decisions concerning nurses are thus part of the larger tapestry of its supervisor jurisprudence. For example, in *Debber Electric*, 313 NLRB 1094 (1994), the Board drew a line between one skilled electrician, who was classified as a supervisor solely on the grounds that he assigned and directed employees, and another electrician, who was classified as an employee because he merely directed other employees working with

him "'the way a journeyman would tell an apprentice' what to do." *Id.* at 1096. This distinction is true to Congress' intention to exclude only "foreman and persons of like or higher rank" and not "leadmen . . . and other minor supervisory officials." *Leg. Hist.* 539, 410.

The Employer's construction of §2(11), in contrast, threatens to sweep all nurses and professions outside the protection of the Act as supervisors. As SFHRM acknowledges, virtually all nurses have some authority to assign less skilled employees and direct their work. SFHRM Br. 5-7. Acceptance of the Employers' position would thus lead to the removal of virtually all nurses from the protection of the Act. Indeed, as the Employers do not refute the fact that the Board has applied the same construction of the Act to other professionals and skilled employees, acceptance of the Employers' position will sweep large numbers of employees in a wide-variety of professions and occupations outside the protection of the Act. The Employer's position is thus contrary to Congress' clear intent to exclude only "foremen and persons of like or higher rank" and not "leadmen . . . and other minor supervisory employees" under §2(11). *Leg. Hist.* 539, 410.

D. The Board's Construction is Consistent With the Legislative History

The legislative history of §2(11), discussed at length in our opening Brief 21-28, simply could not be clearer in revealing Congress' intent: (i) to exclude only "foremen and persons of like or higher rank," but not "leadmen . . . and other minor supervisory employees," *Leg. Hist.* 410, 539; and (ii) that the requirement of "independent judgment" be used to draw this distinction.[2] The Board has respected Congress' clear intent

[2] Notably, the rejected House bill not only contained a broader array of supervisory functions, but did not require that their performance entail the

by construing the ambiguous term "independent judgment" so that nurses and other professional who are at a "like or higher rank" as foremen–for example, Directors of Nursing in other cases and the nurse Clinical Coordinator in this case–are excluded as supervisors while working nurses like the RNs in this case are included as employees.

The Employers pay scant attention to the legislative history with the exception of the Flanders amendment.[3] But the adoption of that floor amendment to the Senate definition of supervisor is in no way inconsistent with the congressional intent reflected in the legislative history taken as a whole.[4]

To the contrary Senator Flanders made clear that his amendment was not intended to exclude all employees who direct others. Rather, he was concerned about "men . . .

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use of independent judgment. *See Leg. Hist.* 167 (H.R. 3020, §2(12)(A)(I), as passed by House).

[3] SFHRM cites language in the House Committee Report listing "nurses" as among the classifications that the House bill intended to exclude. SFHRM Br. 17-18. However, the broader House bill, including the language referenced in the quoted Committee Report, was rejected in favor of the narrower Senate version. Moreover, the reference to nurses had nothing to do with the type of supervisory authority at issue. Rather, as the cited Report itself makes clear, the House Committee was concerned that "[d]octors, nurses, safety engineers, and adjusters handle claims for disability benefits and investigate alleged hazards to safety and health." *Leg. Hist.* 307. The rejected House bill addressed this concern by including within the definition of supervisor "any individual . . . who is employed . . . in connection with claims matters of employees against employers." *Leg. Hist.* 40-41 (H.R. 3020, §2(12)(B), as reported).

[4] In fact, the Employers do not rely on the text of the Flanders's amendment or its adoption, but rather on one phrase in the Senator's explanation of the amendment. However, Senator Flanders' comment cannot be understood to modify Congress' intent in relation to the phrase "independent judgment," as the Employers suggest, as it was made with reference to his amendment which added only the phrase "responsibly to direct."

above the grade of 'straw bosses, lead men, set-up men, and other minor supervisory employees.'" *Leg. Hist.* 1303. He was concerned about officials with "a large responsibility." *Id.* He intended to exclude only an official "charged with the responsible direction of his department and the men under him." *Id.* In other words, Senator Flanders was concerned that under "modern [personnel] practice" many of the functions enumerated in section §2(11) were transferred "to a personnel manager" and that a department head or foreman might actually not be classified as a supervisor contrary to his colleagues' intent. *Id.*

Senator Taft accepted the amendment as a friendly one that did not alter the fact that "[t]he definition in the bill is that which has been used by the National Labor Relations Board for the past 4 or 5 years"–a definition that had not classified skilled workers with incidental authority to direct other as supervisors. *Id.* at 1304; *see* Union's opening Br. 24-26. The amendment's adoption by voice vote without debate makes clear that it was understood only to insure that Congress' previously expressed intent that employees like foremen and department heads who do not themselves work at a trade but direct the work of an entire department be classified as supervisors even if they have none of the other duties enumerated in the original Senate bill.

E. Judicial Deference Is Due the Board's Construction

The Employer argues that the Board's construction of the ambiguous term "independent judgment" is not due deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), because "[t]he NLRB has used arbitrary and manipulative means to achieve policy-directed results." KRCC Br. 21. But this Court has made clear that "resolution of ambiguity in a statutory text," such as that created by the term "independent judgment," "is often more a question of policy than of law" and "federal judges . . .

have a duty to respect legitimate policy choices" of agencies charged with statutory enforcement. *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991); *Chevron* , 467 U.S. at 866.

So long as the agency's construction satisfies the *Chevron* standard, it cannot be overturned based on groundless speculation into the agency's motives of the type engaged in by the Employer. This Court has long refused to engage in just this sort of inquiry into the "unexposed mental processes" of the Board. *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 229 (1947). "In light of the authority with which Congress has endowed the Board, and with due regard to the conscientiousness which [this Court] must attribute to another branch of the Government," this Court must evaluate the Board's decisions based on their express rationale and not presume some unarticulated, improper motive. *Id.*

As explained at length in our opening Brief 32-37, since *HCR*, the Board has treated nurses "the same as all other employee classifications and . . . appl[ied] to them the same test [it] appl[ies] to all other employees." *Ten Broeck*, 320 NLRB at 810. The Employers insist repeatedly that the Board has adopted a construction of the Act unique to nurses. But the Board has expressly done the contrary, applying long-standing and generally applicable principles in the nurse cases and relying on the nurse cases to guide its broader supervisor jurisprudence. Neither the Employer nor SFHRM cites any case where the Board has failed to apply the construction at issue to non-nurse employees. The Board is also committed to "use the same standard in unfair labor practice [ulp] cases as in representation cases. *Providence*, 320 NLRB at 730 n. 31. The Board has sometimes rejected the union's position in both types of cases, holding in representation cases that nurses are supervisors, most recently in *Trevilla of Golden Valley*, 330 NLRB No. 193 (2000), and in ulp cases both that accused nurses are not supervisors and thus not agents of the

employer, *see, e.g., Springfield Jewish Nursing Home*, 292 NLRB 1266 (1989), and that charging-party nurses are supervisors and thus not employees protected from their employer's conduct, most recently in *Westwood Health Care Center*, 330 NLRB No. 141 (2000). Different outcomes have been based on the facts of the cases not on the identity of the parties or nature of the proceedings.

II. The Board Reasonably Placed the Burden of Proof On the Party Asserting the Supervisory Exemption

A. The Administrative Procedure Act Does Not Apply to the NLRB's Unit Determination in this Case

The Employer's position is that in the instant refusal-to-bargain ulp case arising under NLRA §10—where the only issue is the appropriateness of the bargaining unit as previously determined in a related NLRA §9 representation proceeding and where the party challenging that unit determination has not asserted any special circumstances calling for relitigation of the unit question—it is the burden of the NLRB General Counsel to *dis*prove the claims advanced by the Employer in challenging the Board's prior bargaining unit determination in the representation case. The Employer rests its argument on the proposition that "[p]ursuant to the [Administrative Procedure Act (APA)], the burden is on the Board [—actually, the Board's General Counsel—] to prove all the elements of a Section 8 claim." KRCC Br. 24. The Employer then argues that "in a Section 8(a)(5) case, the Board should have the burden of proving that the employer failed to bargain with an appropriate unit," and that this entails proving that the "bargaining unit [is] made up of 'employees' and no 'supervisors.'" *Id.* at 25-26. *See also* Amer. Health Care Ass'n (AHCA) Br. 5-10.

A basic flaw in the Employer's argument is that the appropriateness of the bargaining unit is *not* an element of the

ulp allegation put before the Board in a §8(a)(5) case based on an employer's refusal to bargain with the representative certified in a §9 representation case. To the contrary, as we show by tracing the process outlined by Congress, the Act expressly contemplates that the Board may rely on the unit finding that underlies the certification issued in a §9 representation case in deciding a subsequent refusal-to-bargain ulp case brought under §10.

The Act provides, first of all, that the Board "shall" determine "the unit appropriate for the purposes of collective bargaining" in a representation case arising under § 9, 29 U.S.C §159(b), rather than in a ulp case arising under §10(c). Thus, a finding that the unit is appropriate necessarily underlies all certifications issued under §9(c)(1). The Act also provides that among the ulp cases arising under §10(c) are §8(a)(5) cases, such as the instant case, in which the NLRB General Counsel alleges that an employer has "refuse[d] to bargain collectively with the representatives of his employees, subject to the provisions of § 9(a)." 29 U.S.C. §158(a)(5). In such cases, the Act expressly states that the "order of the Board made pursuant to section 10(c)," remedying the ulp, may be "based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of [§9]." 29 U.S.C. §159(d).[5]

[5] In full, the subsection provides:

> Whenever an order of the Board made pursuant to section 10(c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10(e) or 10(f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript. [29 U.S.C. §159(d).]

It is significant that the statute does *not* provide for the inclusion of the record from the §9 proceeding in the record *before the Board* in the related ulp proceeding under §10. Rather, the §9 record is only included in the record filed with the court of appeals on a petition for review or enforcement of the order resulting from the ulp case. Thus, the statute expressly contemplates "an order of the Board made pursuant to section 10(c) [that] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of . . . section [9]," without "the record of such investigation" being before the Board in the §10 proceeding. 29 U.S.C. §159(d).

Based on this statutory scheme, it is firmly established that "when the Board resolves an issue after a fair hearing in Section 9 representation proceedings, it is not required to reconsider the same issue and evidence in the ensuing [ulp] proceedings under Section 10." *NLRB v. Champa Linen Service Co.*, 437 F.2d 1259, 1261 (10th Cir. 1971). In particular, in a ulp case where the employer "contests the election, including the unit determination" made by the Board in a prior representation case, "the determination of the bargaining unit . . . need not be reviewed by the Board." *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 139 (1971). *See Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 161-162 (1941).[6]

This Court explained the relationship between a representation proceeding under §9 and a refusal-to-bargain ulp proceeding under §10 in both *AFL v. NLRB*, 308 U.S. 401, 406 (1940), and *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-77 (1964).

[6] This rule against relitigation "protects the integrity of the administrative process by requiring a party to produce all available evidence relevant to the unit certification issue at the time of the original representation hearing rather than attempting to relitigate the unit issue in the context of the subsequent [ulp] hearing." *Burns Electronic Security Services, Inc. v. NLRB*, 624 F.2d 403, 407 (2d Cir. 1980).

Under this statutory scheme, the Board may conclude that an employer has "refuse[d] to bargain collectively with the representatives of his employees, subject to the provisions of section 9," 29 U.S.C. §158(a)(5), by finding: i) that such a representative has been certified pursuant to §9; ii) that the representative has requested to bargain with the employer; and iii) that the employer has refused that request. Accordingly, the General Counsel's burden in such a ulp case is to prove these three elements, and *not* to prove the facts underlying the certification or to disprove employer claims of error in the unit determination made in the related §9 representation case. *See* NLRB Br. 41. In the instant case, the General Counsel met this burden by alleging these three elements, Complaint ¶s 6, 8 & 9, and obtaining admissions of each, Answer ¶s 6, 8 & 9.

The foregoing makes it plain that the Employer has no APA argument at all. In a case like this, the Board's unit determination is made in a representation proceeding under §9, and such a proceeding is exempt from the APA hearing requirements. *See* 5 U.S.C. §554(a)(6) ("This section applies . . . in every case of adjudication . . ., except to the extent that

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"[T]he Board has discretion [in §10 ulp cases] to reopen the issue [decided in a prior §9 representation case] where newly discovered noncumulative evidence is available," *Magnesium Casting*, 401 U.S. at 139-140, or some other "special circumstances" warrants reopening the issue. *Thomas Davis Medical Center v. NLRB*, 157 F.3d 909, 912-13 (D.C.Cir. 1998). Thus, the Employer in the instant refusal-to-bargain ulp case could have requested reconsideration of the Board's prior unit determination on the grounds that the "representation procedures [we]re inadequate to establish [the] factual basis" for that determination as the AHCA argues in the abstract may be the case. AHCA Br. 19. However, the Board found that the Employer "d[id] not offer to adduce at a hearing [in the ulp case] any newly discovered and previously unavailable evidence, nor d[id] it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding," PA 27a, and the Employer is therefore precluded from raising these issues under *Pittsburgh Plate Glass*, 313 U. S. at 162.

there is involved . . . the certification of worker representatives.") "In recognition of their unique character, Congress has removed representation hearings from the requirements of §5 of the A[PA]." *NLRB v. Air Control Products*, 335 F.2d 245, 251 (5th Cir. 1964). Neither "the letter [n]or spirit of the [APA] is violated by the fact that the unit determination made in the exempt representation proceedings [i]s not relitigated or tried *de novo* in the [ulp] proceedings." *Champa Linen*, 437 F.2d at 1262. This is so because "the representation proceedings [a]re exempt from the provisions of the Act, and the [ulp] proceedings, though not exempt under the Act, [a]re conducted in accordance with the provisions of the Act." *Id.* (citations omitted).

B. Exemption Is an Affirmative Defense Concerning Which The Proponent Has the Burden Of Proof Consistent With the APA

While the foregoing is dispositive, we add that, even in proceedings that are governed by the APA, it is proper to place the burden of proof on the party asserting an affirmative defense based on an exemption from statutory coverage.

The term "employee" is defined broadly by the NLRA to include "any employee." 29 U.S.C. §152(3). The Act's broad protection of "any employee" is subject to six specific exceptions, including "any individual employer as a supervisor." *Id.* The specific exceptions to the NLRA definition of covered "employee[s]" have been characterized by this Court as "exemptions from NLRA coverage." *Holly Farms Corp. v NLRB*, 517 U.S. 392, 399 (1996). And, the Court has warned, these "exemptions . . . are not [to be] so expansively interpreted as to deny protection to workers the Act was designed to reach." *Id.* As support for this reading of the NLRA, this Court relied upon cases holding that "exemptions from the Fair Labor Standards Act are to be narrowly construed." *Id.* (*quoting Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959)).

The same line of FLSA cases relied upon in *Holly Farms* also hold that "the application of an exemption . . . is a matter of affirmative defense on which the employer has the burden of proof." *Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974). The Board has correctly relied on these cases—and the principle of statutory construction employed in them—in allocating the burden of proof to the party claiming that an employee comes within the exemption for supervisors.

CONCLUSION

For the above-stated reasons, the judgment of the Court of Appeals should be reversed.

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